IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Mada Ram alias Madia Vs. State of Rajasthan

D.B.CRIMINAL APPEAL NO.265/2002
against the judgment dt.25.2.2002
passed by Additional Sessions Judge, Pali,
in Sessions Case No.30/2001.

Date of Judgment: July 07,2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

Mr.Vineet Jain, for the appellant.
Mr.O.P.Rathi, Public Prosecutor.

BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. Appellant Mada Ram alias Madia faced trial for allegedly committing homicidal death of one Asa Ram. Learned Additional Sessions Judge Pali, having found appellant Mada Ram guilty, convicted him of the offence under Section 302 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs.2000/- and in default, to further undergo six months' simple imprisonment.

2. Briefly stated the facts of the case are that the F.I.R. Ex.P.15 bearing No.56/99 came to be registered at Police Station Guda Andla, District Pali, on 17.3.1999 at about 4.30 PM on the basis of `parcha bayan' Ex.P.14 of deceased Asa Ram recorded by P.W.19 Khem Singh, Head Constable, in Bangur Hospital at Pali on the same day at about 1.50 PM.

3. P.W.19 Khem Singh stated that on 17.3.1999, he was posted as Head Constable at the Police Station, Guda Andla. At about 12 Noon, he received information from P.W.12 Bhima Ram to the effect that his brother Asa Ram was brutally assaulted near the Balrai river, while on way to Balrai fair. On receiving the information, he alongwith one Constable viz; Ishaq Mohd. rushed to the spot. They found Asa Ram lying injured. With the help of the family members of Asa Ram, he brought Asa Ram to Bangur Hospital at Pali.

He gave a requisition to the duty doctor for medical examination. He also recorded his statement. It was disclosed by Asa Ram that in the morning at about 11.30, he left village Guda Andla for village Balrai to participate in the Daneshwar fair. He was in the company of PW 6 Goma Ram, PW 11 Daria, PW 8 Bhanwarlal and PW 9 Peera Ram and many others. While he was crossing the river, all of a sudden appellant Mada Ram came out of a hiatus and mounted attack on him. He inflicted injuries on various parts of his body by lathi, on account of which he fell down. He also threatened the persons accompanying him to desist from intervening in the matter, else they would also face the same fate. He also torn his clothes and undressed him. He took out Rs.100/- from his pocket. He was admitted in the hospital by PW 15 Hari Ram, PW 14 Gaja Ram, PW 10 Saka Ram, his brother PW 12 Bheema Ram and his wife. Before PW 19 Khem Singh could leave Pali, he received an information to the effect that Asa Ram succumbed to the injuries. Thus, he returned back to the hospital. He gave information to the concerned Police Station and proceeded with the investigation of the case. He prepared the inquest report of the dead body and sent it for post mortem. P.W.7 Dr.S.C.Jain conducted the post mortem vide Ex.P.10 noticing the following injuries:

"1. Lacerated wound 2 x 0.9cm x bone deep left upper

leg 5cm below knee;

2. Swelling on left upper leg with deformity, underlying bone fractured;

3. Lacerated wound 2 x 0.8cm x bone deep middle ¾ of left forearm;

4. Bruise 3 x 5cm, 5 x 8cm on left hip region & abdomen;

5. Diffused swelling on left side of chest wall;

6. Abrasion 1 x 2cm, Right lower forearm near wrist."

In his opinion, the cause of death was shock due to injury to vital organs (spleen & mesentery of large intestines). All the injuries were reported to be ante mortem in nature.

4. The appellant was arrested on 22.5.2000 vide Ex.P.14. (It appears that the trial Court has inadvertently marked both the documents i.e. arrest memo as well as `parcha bayan' as Ex.P.14). After usual investigation, the police laid the chargesheet against the appellant for the offence u/ss.302, 341 and 435 IPC.

5. Appellant denied the charges levelled against him and claimed trial. The prosecution in support of the case produced three sets of evidence in order to bring home guilt of the appellant viz; (i) eye witnesses, (ii) oral dying declaraton and (iii) dying declaration recorded by the police. The appellant in his statement u/s. 313 CrPC denied the

correctness of the prosecution evidence appearing against him and claimed trial. The trial Court discredited the testimony of the eye witnesses so as the evidence of oral dying declaration but, however, convicted the appellant on the basis of dying declaration Ex.P.14 recorded by PW 19 Khem Singh Head Constable and sentenced him in the manner noticed above.

6. Since the conviction has been recorded solely on the basis of dying declaration Ex.P.14, we proceed to deal with the same at the first instance. In the instant case, the dying declaration has been recorded by the police. A Division Bench of this court in Abdul Majid alias Raju v. State of Rajasthan reported in RLW 2002(1) Raj.165 dealing with the dying declaration recorded by the police observed as follows:

> "It is now well settled that in a case wherein statement is made before the police and the witness succumbed to the injuries, the statement can be treated as the dying declaration and is admissible under Section 32 (1) of the Evidence Act. The caution is that such a dying declaration has to be approached with great circumspection. Normally, it is not prudent to base conviction on a dying declaration made before the investigating Officer. The court is required to satisfy as to whether there was sufficient opportunity to get the statement recorded by a Magistrate. It must also be ensured that a person making dying declaration was in a fit condition to give statement. Thus, the prosecution is required to prove that the dying declaration is genuine, true and free from all doubts and it was recorded while injured was in fit state of mind. In absence of medical certification that the

> injured was in a fit state of mind at the time of recording of dying declaration, it would not be safe to make the subject to the satisfaction of the police officer to the effect that injured was in a fit state of mind at the time of making declaration."

7. It is submitted by Mr.Vineet Jain learned counsel for the appellant that the dying declaration Ex.P.14 recorded by PW 19 Khem Singh is not creditable for more than one reasons. Firstly, there is no certificate to the effect that deceased was in a fit condition to give statement. Secondly, some of the witnesses have stated that while the deceased was taken to the hospital, he was not in a condition to speak and none of the witnesses present in the hospitall stated that the police recorded the statement of the deceased. Learned counsel has pointed out serious infirmities in the dying declaration.

8. We have carefully gone through the dying declaration Ex.P.14 and the statement of PW 19 Khem Singh. He has admitted that he did not obtain any certificate from the doctor to the effect that deceased was in a fit condition to give statement. He has also admitted that doctors and nurses were present at the time when he recorded the statement but he did not consider it necessary to get the certificate as to fitness of deceased. No effort has been made by the prosecution to produce the bed head ticket or any document to show that the deceased was admitted in

the hospital and the treatment was given to him. PW 13 Smt.Sajna wife of deceased has stated that when her husband was taken to the hospital, he was not in a condition to speak. PW 12 Bheema brother of deceased, PW 13 Smt.Sajna wife of deceased, PW 14 Gaja Ram son of deceased and PW 15 Hari Ram another son of deceased, have not uttered a word that statement of deceased was recorded by the police in the hospital. It is only PW 10 Saka Ram who stated that the statement of the deceased was recorded by the police. However, he stated that the statement was recorded at about 5-6 PM. The dying declaration Ex.P.14 shows that it was recorded at about 1.50 PM. The post mortem report shows that he died at 3 PM. This falsifies the statement of PW 10 Saka Ram. Thus, we are of the view that conviction of the appellant cannot be sustained solely on the basis of dying declaration recorded by PW 19 Khem Singh.

9. In the dying declaration Ex.P.14, there is a reference of P.W.6 Bheema Ram, PW 8 Bhanwarlal and PW 9 Peera Ram but none of them have supported the prosecution case. The prosecution also examined PW 3 Phufi, PW 4 Nenu and PW 11 Daria as eye witnesses. P.W.3 Phufi has not supported the prosecution case. P.W.4 Nenu has admitted that after seeing the incident, she went to fair and did not inform anybody regarding the incident, although many

persons were present there whom she knew. She also stated that she was present when the police came on the spot but she did not disclose the incident. She also admitted that she did not inform the incident to the people at the house of deceased Asa Ram. On thorough discussion, the learned trial Court has discredited the testimony of this witness. P.W.11 Daria has admitted that after witnessing the incident, she went to the fair where she met many persons but she did not disclose the incident to anybody. The trial Court on elaborate discussion, discredited the testimony of this witness as well. Learned Public Prosecutor has not challenged the finding of the learned trial Court discrediting the testimony of the eye witnesses produced by the prosecution as referred-to above. On careful consideration, we are of the view that the trial Court has rightly discredited the testimony of the alleged eye witnesses referred to above.

10. Another set of witnesses pertains to oral dying declaration. The prosecution has produced P.W.10 Saka Ram, PW 12 Bheema Ram, PW 13 Smt.Sajna, PW 14 Gajja Ram and PW 15 Hari Ram. The trial Court has discredited the testimony of all the eye witnesses. The statement of PW 10 Saka Ram was recorded by the police after 20 days of the incident. He also admitted that the fact of oral dying declaration was not disclosed by him to anybody. Similarly,

PW 13 Smt.Sajna admitted that enroute to hospital, the deceased was not a position to speak. In view of the admission, the trial Court held that there was no occasion for the oral dying declaraton before Smt.Sajna. As far as PW 14 Gajja Ram is concerned, when he was confronted with his police statement Ex.D.3, he admitted that he did not disclose the fact of oral dying declaration before the police. Similarly, PW 15 Hari Ram stated that conversation with the deceased took place enroute to the hospital but on being confronted with his earlier statement Ex.D.4, it was admitted that he did not make any statement before the police as to dying declaration of the deceased before him. The findings of the trial Court discrediting the aforesaid witnesses, have not been challenged by the learned Public Prosecutor. On careful consideration of the matter, we are of the view that the trial Court has rightly discredited the testimony of the aforesaid witnesses. In view of the aforesaid, we are of the view that the learned trial Judge has committed error in convicting the appellant solely on the basis of the dying declaration recorded by the police, which we have not found to be creditworthy.

11. Consequently, the appeal is allowed. The judgment dated 25.2.2002 passed by the learned Additional Sessions Judge, Pali convicting appellant Mada Ram alias Madia of the offence under Sections 302, 341 and 435 IPC is set aside.

He is acquitted of the charges levelled against him. He is in jail. He shall be released forthwith, if not required in any other case.

(R.P.VYAS), J. **(N.N.MATHUR), J.**

RANKAWAT JK, PS